IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 814

UNITED STATES OF AMERICA,

Petitioner,

vs.

MERCHANTS MATRIX CUT SYNDICATE, INC.,

Respondent.

BRIEF OF RESPONDENT, MERCHANTS MATRIX CUT SYNDICATE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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We respectfully submit to the Honorable Judges of the Supreme Court of the United States of America the following brief on behalf of the respondent in opposition to the petition for writ of certiorari erroneously sought by counsel for the Government to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on September 3, 1958.

JURISDICTION.

Respondent respectfully asserts that petitioner has failed to show to this Court that there are special and important reasons why said writ should be granted, and therefore of necessity the writ should be denied under the Rules of this Court.

In fact petitioner has significantly failed to show that anything more is involved here than the rights and liabilities of the immediate parties to this cause of action. That petitioner is thus erroneously merely seeking a redetermination of the rights of the parties to this cause of action is clearly shown by the following:

1. Under the decision of this Court in *Rayonnier* v. *United States*, 352 U. S. 315 and the decision of this Court in *Indian Towing Company* v. *United States*, 350 U. S. 61, cited in the *Rayonnier* case (p. 319), the test established by the Federal Tort Claims Act for determining the Government's liability is whether a private person would be responsible for similar negligence under the laws of the State of Illinois, the State where the negligent, wrongful and tortious acts, complained of and proven here, occurred; and therefore, in the absence of any showing by petitioner and there is none, that the decision of the Court of Appeals is not proper under the laws of the State of Illinois, clearly then there is no jurisdiction for this writ, as petitioner neither questions or denies that the *Rayonnier* case is determinative of the issues of this case, as was so held by the court below.

2. The proofs of liability and amount of damages were made in accordance with the law of Illinois and according to the rules of evidence applicable under Illinois law to prove damages for tortious disturbance of possession and to prove damages upon eviction; and the petitioner at no time during the trial either objected to the proofs as made or submitted any proofs to the contrary.

3. Concurrent findings of fact were made by both of the courts below that the lease entered into between the Government and Clark-Congress Corporation was "a voluntary leasing by both parties thereto" (Finding of Fact 1, page 25 of Petition in Appendix, opinion below); and therefore petitioner cannot change this fact by erroneously stating

that said lease was "entered into under threat of condemnation" as opposing counsel attempt to do, at page 2 of their petition under the guise of "Questions Presented."

4. The cases cited by counsel for petitioner, at pages 10 to 12 inclusive of said petition, concerning the admissibility or relevance of certain evidence in condemnation cases, are clearly cases that have no applicability to the case at bar, and whatever conflict or discrepancy, if any there may be, in the different federal courts as to the admission or relevancy of certain evidence, can clearly give no importance or special reason for this court to take the case at bar.

QUESTIONS PRESENTED.

Whether, in an action for damages under the Federal Tort-Claims Act, 28 U. S. C., Sec. 1346 (b) and Sec. 2674, where it was found as a fact by the trial court, and also by the Court of Appeals that respondent was trespassed against, deprived of the beneficial use and enjoyment of the premises leased to it, and evicted by negligent and tortious acts of the Government, and where the law applicable to the facts of the case at bar is clearly laid down by this Court, and is that the liability of the petitioner for said acts, and the damages to be awarded due to said acts, is governed by the laws of the state where said acts occurred, petitioner for a writ of certiorari is entitled to have this Court review this case, when said petitioner has failed to show that the liability for said acts, and the damages awarded due to said acts, are not proper under the laws of the state where said acts occurred.

And further whether, where two lower courts, the trial court and the Court of Appeals both found as a fact that the leasing was a voluntary leasing, can petitioner by merely stating that the leasing was "under threat of condemnation", which is contrary to the truth in this case,

invoke certain cases in the federal courts relating to the admissibility and relevancy of evidence in condemnation cases as a ground for granting such a writ, where such cases are clearly inapplicable to the facts of this case, to-wit, a voluntary leasing.

STATEMENT.

Petitioner's statement fails to disclose with proper forthrightness that the facts proven on the trial of this case and found by the District Court are fully set forth in the record (see Findings of Fact, Government Appendix filed in the Court of Appeals, pp. 74-82, inclusive) and that these same facts as so found are again found and confirmed in the Opinion of the United States Court of Appeals for the Seventh Circuit, rendered September 3, 1958 (Appendix to Petition for Writ, pp. 24-32, inclusive).

Petitioner's statement fails to state that both courts below in their findings of fact found that respondent was caused to abandon the premises by the wrongful and tortious acts of the petitioner, and that said eviction occurred prior to the commencement of condemnation proceedings by the petitioner (see Findings of Fact 9, 10, 11, 12, 13 and 14, at pp. 29-32, inclusive, of Appendix to Petition).

Instead opposing counsel misinform this Court by stating in their "Questions Presented" (at p. 2 of the Petition) that respondent was, and we quote: "alleged to have been wrongfully evicted."

Petitioner's statement further fails to state that both courts below found that the lease between the Government and Clark-Congress Corporation (Plaintiff's Exhibit 18, set forth in the Government's Appendix, p. 16, filed in the Court of Appeals) was a voluntary leasing by both parties thereto. In confirming the Findings of Fact the Court of

Appeals in Finding of Fact 1 (see pp. 24, 25 of Appendix to Petition), found, and we quote, as follows:

> "Clark-Congress Corporation purchased the building from Rand McNally & Company on June 30, 1949, and was the landlord of Merchants Matrix Cut Syndicate, Inc., and Clark-Congress Corporation also was the landlord of the United States of America (G. S. A.) after entering into a lease with the United States of America on June 22, 1951, which lease is Plaintiff's Exhibit No. 18, *and which leasing was a voluntary leasing by both parties thereto.*" (Emphasis added.)

Instead opposing counsel misinform this Court by stating in their "Questions Presented" (at p. 2 of the Petition) that the lease was entered into, and we quote: "under threat of condemnation."

Plaintiff's Exhibit No. 23 (Tr. 134, 259), which exhibit is a part of the record on this petition together with the other original exhibits, was an agreement by the Government (G. S. A.) to lease for an additional period to the largest single occupier of the building, namely Rand McNally & Company. Rand McNally & Company agreed to cancel its existing lease with Clark-Congress Corporation as of December 31, 1951, and the Government agreed to sublease to Rand McNally & Company for a period of fourteen months commencing January 1, 1952 and extending to February 28, 1953, some 230,000 square feet in the building. And the Government further agreed in paragraph 3(a) thereof (Plaintiff's Exhibit No. 23) as follows:

> "* * * (a) that Rand's right to use and occupy the space in the premises presently occupied by it after February 28, 1953, shall be extended for such time or periods of delay in completing the construction of Rand's new building resulting from any cause beyond Rand's control."

This raises the question of whether opposing counsel are

correct in stating at page 3 of the Petition, and we quote as follows, from said Petition:

> "In 1951, the General Services Administration seeking suitable space for use by the Bureau of Public Debt determined to acquire the use of the Rand McNally Building in Chicago."

Actually, as the facts clearly show, it was merely determined by the Government to lease the Rand McNally Building "subject to existing leases". (Gov't Lease. Pltf's Exh. 18, Tr. 96, Gov't App. 16, 18, Par. 1-b.)

In addition the testimony of Mr. Lund, Deputy Regional Director of General Services Administration (Tr., p. 132. Plaintiff's Appendix to Court of Appeals brief, pp. 22. 23) at the time of the negligent and wrongful acts committed here—testimony given by deposition at a hearing prior to the trial below and which deposition statements were read into the transcript at the trial of this cause—stated that the only pressure on the Government to quickly house the Bureau of Public Debt in the Rand McNally Building came from the owner of the Merchandise Mart, where the Bureau was already adequately housed.

ARGUMENT.

The most pertinent facts of this case are set forth in the opinion of the United States Court of Appeals for the Seventh Circuit through that court's reaffirmation of the trial court's Findings of Fact (259 F. 2d 747, see Petition for Writ of Certiorari, Appendix, at pp. 24-32).

I.

The law applicable to the facts of this case has been clearly and unmistakably stated by this Court, in the case of *Rayonnier* v. *United States*, 352 U. S. 315, at pp. 318, 319, as follows:

> "The Tort Claims Act makes the United States liable * * * for the negligence of its employees * * * in the same manner and at the same extent as a private individual under like circumstances * * * 28 U. S. C. Section 2674 * * *. As we recently held in *Indian Towing Co.* v. *United States*, 350 U. S. 61, 100 L. Ed. 48, 76 S. Ct. 122, the *test* established by the Tort Claims Act for determining the United States liability, *is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred.*" (Emphasis added.)

Opposing counsel have neither questioned nor denied that the *Rayonnier* case is determinative of the issues of the case at bar, yet opposing counsel have nowhere shown that the liability for the acts as found here by two concurrent courts below and the damages awarded due to said acts, are not proper under the law of the state where the acts occurred. Instead they have merely tried to confuse the issue by relying on cases which are not even applicable to the facts of the case at bar.

The only semblance of an argument that opposing counsel advance in an effort to give any plausibility at all to a claim of jurisdiction by petition for writ of certiorari is their attempt to argue that there is an important reason why this Court should take this cause because some possible confusion might exist in the federal courts, at the Courts of Appeal level, as to the admissibility or relevance of evidence in condemnation cases under a particular set of facts that include the "threat of condemnation" which fact is not present here. See our argument *infra* this brief.

Opposing counsel nowhere refute that under the law of the state of Illinois there would be a liability on a private person for the negligent and wrongful acts committed here, and for the damages resulting from said acts, and they could not if they tried, as it is very clear that there is such liability under Illinois law. See the following Illinois cases: *Sanborn* v. *Marquette Building Co.*, 86 Ill. App. 681, 684, 685; *Best Manufacturing Co.* v. *Peoria Creamery Co.*, 307 Ill. 238; *Northern Trust Co.* v. *Palmer*, 171 Ill. 383; *Chapman* v. *Kirby*, 49 Ill. 211.

In the case of *Chapman* v. *Kirby*, 49 Ill. 211, at pp. 217, 218, the Illinois Court said:

> "This was an action on the case" (trespass on the case) "and not a contract. In all actions of tort, the measure of damages is not less than the amount of the damages sustained, and in *case*, all of the consequential damages sustained, connected with or flowing from the act complained of by the plaintiff."

In other words proven facts in open court, confirmed by findings of fact by the trial court, which findings of fact were reaffirmed by the Court of Appeals, show negligent, wrongful and tortious acts amounting to a continuous and continuing trespass in the nature of a nuisance, frequent and serious additional disturbances of possession and pos-

essory rights, acts which made the premises unfit for the purposes for which plaintiff had leased them, caused plaintiff to abandon the premises and constituted an eviction of plaintiff-respondent by defendant-petitioner, and these acts were tortious in character, and in the nature of a tort action, in *case*, and created liability for all of the damages awarded by the United States Court of Appeals for the Seventh Circuit under Illinois law, the law of the state where the acts occurred, which law is the test of defendant's liability under the *Rayonnier* (352 U. S. 315) and *Indian Towing* (350 U. S. 61) cases.

II.

Opposing counsel are attempting to have this Court take this case on a petition for writ of certiorari and proceed to redetermine the rights of the parties to this cause. This clearly they have no right to ask this Court to do. Opposing counsel have failed in any way to dispute the liability and consequent damages under Illinois law. Opposing counsel ignore the proof made in open court, they ignore the Tort Claims Act as interpreted by this Court in the *Rayonnier* and *Indian Towing* cases; they ignore the applicable Illinois law. Instead they state, at page 2 of their Petition, that plaintiff was, and we quote *verbatim* from opposing counsel's petition: "alleged to have been wrongfully evicted." Then from this improperly stated base as a false foundation, they proceed with specious and erroneous arguments, ending up with an attempt to apply inapplicable cases to the case at bar. Clearly the plaintiff was evicted beyond any further questioning by opposing counsel; clearly they are merely attempting to ask this Court to redetermine the rights of the parties to this cause.

That the Federal Courts follow the law of the state in which they are sitting as declared by the state courts,

in respect to damages in actions at law is too well established as authority to require any citation of cases by respondent here.

III.

1. Opposing counsel attempt to give this Court, as a reason for taking jurisdiction of the Petition, the specious argument that because in certain condemnation cases in the federal courts there may be some distinction between the rules laid down relative to admissible and relevant evidence as to value, this Court, in this Tort Claims case, should resolve such distinction if any there be. The Government has had ample opportunity in a number of said cases so cited by themselves here, to have petitioned this Court for a writ of certiorari to resolve such distinction or conflict, and has failed so to do. We submit that in the case at bar, where such condemnation cases are in no way applicable, as we have already shown in our foregoing argument as to the applicability of Illinois law under the doctrine of the *Rayonnier* case, that this Court should not take this case to resolve such distinction, if any, in such condemnation cases.

Opposing counsel further attempt to bring in these condemnation cases on the false premise that there was a "threat of condemnation" present in connection with the Government—Clark-Congress lease of June 22, 1951 (Plaintiff's Exhibit 18, Tr. 95, 96, Gov't App. 16). That this premise is false is clearly shown by an examination of the Findings of Fact, affirmed and reaffirmed by two successive courts. Finding of Fact 1 (pp. 24 and 25, Appendix to Petition) clearly states as follows:

> "Clark-Congress Corporation purchased the building from Rand McNally & Company on June 30, 1949, and was the landlord of Merchants Matrix Cut Syndicate, Inc., and Clark-Congress Corporation also was

> the landlord of the United States of America (G. S. A.) after entering into a lease with the United States of America on June 22, 1951, which lease is Plaintiff's Exhibit No. 18, *and which leasing was a voluntary leasing by both parties thereto.*" (Emphasis added.)

It is a familiar principle, repeatedly applied by the decisions of this Court, that findings of fact concurred in by two lower courts will be accepted by this Court unless clear error is shown. See *Faulkner* v. *Gibbs*, 338 U. S. 267, 268; and similar cases.

Therefore this leasing being a voluntary leasing, opposing counsel's cases cited as laying down conflicting rules as to evidence as being a basis why this Court should take this case on petition for writ of certiorari clearly fail. There are no cases in courts of any jurisdiction, federal or state, that refuse to admit evidence of a voluntary transaction in respect to the identical property.

2. Since opposing counsel have so frequently in their Petition made the statement that there was a "threat of condemnation" element present in this leasing, we are sure this Court is interested in anything that will help throw the full searchlight of truth on this matter. The testimony of Mr. Robert Roesing, President of Clark-Congress Corporation, given under oath at the trial of the cross-claim against Clark-Congress, in Case 51 C 2024, United States District Court, N. D. Illinois, Eastern Division, which testimony is found at pp. 636 and 637 of the Transcript of Record in the case of *United States* v. *Merchants Matrix Cut Syndicate*, 219 F. 2d 90 (7th Cir., 1955), is as follows, and we quote:

> "Q. Now at the time that Mr. Skeen" (the regional director of G. S. A.) "called you the first time on the telephone and suggested that he was interested in renting the Rand McNally Building for the Government, did he tell you that he intended to file

condemnation proceedings against the Rand McNally Building?

A. (Mr. Roesing.) No, sir.

Q. During any of these negotiations did he tell you that he intended to file condemnation proceedings against the Rand McNally Building?

A. (Mr. Roesing.) No sir, he did not in any of the conversations tell me that he intended to file condemnation proceedings against the building."

Clearly opposing counsel's implication to the contrary is not based on fact.

In addition, the only reasons advanced by opposing counsel for this Court to take the case, on the misguided assumption that the condemnation cases cited at pp. 10, 11 and 12 of the Petition are applicable, are that (1) condemnor's needs are often particularly imperative, and (2) a policy favoring amicable settlement of litigation. Not only are the cases not applicable to the case at bar, clearly the reasons are not applicable either.

Certainly there was no imperative need for the Government to lease space in the Rand McNally Building any more so than any number of buildings in the Chicago area, and in addition the bureau of the Government that moved into the Rand McNally Building was already adequately housed in the Merchandise Mart, another building in Chicago, and voluntarily gave up part of its term under its lease therein. The testimony of Mr. Lund, Deputy Regional Director of General Services Administration (Tr. p. 132, Plaintiff Appendix to Court of Appeals brief, p. 22) shows that the only pressure on the Government to quickly house the Bureau of Public Debt in the Rand McNally Building came from the owner of the Merchandise Mart.

Equally certain is the fact that any thought of amicable settlement of litigation has been the policy farthest from

opposing counsel's thoughts in the case at bar. It seems exceedingly strange that a policy of amicable settlement of litigation should be used as an argument to escape liability for a tortious wrongdoing. No offer of any kind was ever made by the Government to plaintiff in this case to amicably resolve the problems involved.

IV.

We could devote numerous additional pages to refuting opposing counsel's statements and arguments point by point, but we see no reason to burden this most important and busy Court with such a lengthy treatise as this would call for. Opposing counsel themselves, at page 18 of the Petition, state, and we quote verbatim from the Petition as follows:

> "Many of the questions are of fact; others though 'of law' turn so heavily on the particular facts of this case as to be of little general importance; and the rulings of the rest can perhaps best be treated as unlikely to influence the course of the law."

However the statement at point II (e), at page 17 of Petition, is especially worthy of refutation as a prime example of opposing counsel's general attempt to twist and distort the facts to this Court. Respondent's contracting for quarters elsewhere was the only and the quickest way it could move to any place other than out to the middle of the street (see Findings of Fact 12 and 13, at page 31, Appendix to Petition); and the alteration and reconstruction work in the building, including additional demolition work, far from ceasing in December, 1951, as opposing counsel misinform this Court, continued unabated for months thereafter (see Finding of Fact 13, p. 31, Appendix to Petition).

V.

Opposing counsel at the trial of this cause of action did not see fit to put in any evidence as to the value of plaintiff's space in the Rand McNally Building, as to which space plaintiff was deprived of the beneficial use and enjoyment, caused to abandon the premises and thus evicted by the tortious acts of the Government (see Findings of Fact, 10, 11, 12, and 13, Opinion, Pet. Appendix 30, 31). Nor did they see fit to make any objection to the trial court as to the testimony of Mr. Gilbert Schribner, plaintiff's most highly qualified expert witness, who testified fully as to the value of said space (Tr. 200-214). An examination of Plaintiff's Exhibit No. 19, which was the certificate of the Acting Commissioner of Public Buildings (Appendix to Appellee's brief in Court of Appeals, at p. 2) clearly shows that the estimated cost of building services and maintenance and the cost of repairs and alterations were definitely used to figure over-all rental paid under the lease of June 21, 1951. The Government merely figured the costs of building service and maintenance at a lower figure than did Merchant's expert witness, Mr. Gilbert Schribner.

Not only did petitioner fail to make any objection to the testimony of fair market value as given at the trial of the case in the district court, and thus fail to properly preserve any right to a review of the determination of that value by the district court sitting without a jury, but also the two courts below made concurrent findings as to the fair market value of respondent's space as the record shows.

Government counsel must admit grievous injury fered by respondent as a result of these tortious act the sole effort of opposing counsel by this Petition is to try desperately to deprive respondent of any financial

reimbursement whatsoever, and leave respondent in the position of having suffered grievous loss and damage uncompensated by the courts, and having added thereto the additional burden of not inconsiderable legal costs and expenses caused by this extended litigation.

We respectfully submit that despite opposing counsel's inaccurate statement of the "questions presented", the petition herein shows no error in the decision sought to be reviewed; shows the case involves primarily questions of fact upon which two courts below have unanimously agreed; shows that the decision below does not conflict with decisions of other Courts of Appeal, nor are the cases in the other Courts of Appeal cited by petitioner applicable to the facts of the case; and shows that there are no special and important reasons present in this case to warrant the grant of certiorari.

CONCLUSION.

For the foregoing reasons, it is submitted that the Government's petition for writ of certiorari should be denied.

Respectfully submitted,

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